IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO. 5862 OF 2003

1. Union of India,
   through the General Manager,
   Western Railways,
   Headquarters Office,
   Churchgate, Mumbai.

2. The Secretary,
   Railway Board,
   Ministry of Railways,
   Rail Bhavan, New Delhi. : Petitioners

V/s.

Naresh K. Gupta,
Chief Engineer (Construction &
Survey), Western Railway,
Headquarters Office, Churchgate,
Mumbai, R/o. Flat No.P/86,
Badhwar Park, Woodehouse Road,
Colaba--400 005. : Respondent

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Mr. Suresh Kumar for the Petitioner.
Mr. J.P.Cama with Mr.G.S.Walia for the Respondent.

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CORAM : S.RADHAKRISHNAN &
S.A.BOBDE, JJ.

Date of reserving): **26.10.2004**
the Judgment)

Date of pronouncing):
the Judgment) **05.11.2004.**

JUDGEMENT (PER - S. RADHAKRISHNAN, J.)

1. By the present petition, the Union of India has questioned the order dated 25.4.2003 of the Mumbai Bench of the Central Administrative Tribunal. By the impugned order, the Tribunal has held that the respondent, Naresh K. Gupta's promotion should not have been deemed as if in

a sealed cover in terms of para 6 of the Railway Board's letter dated 21.1.1993. Therefore, since he was already empanelled, he is entitled to be promoted from 14.6.2002 i.e. the date on which his junior has been promoted to the post of principal Head of the Department in the Railway.

2. The respondent was appointed in the Indian Railway as an Engineer in the year 1972. On 15.2.1996 he was promoted to Senior Administrative Grade of Rs.18,000 -- Rs.22,400.

3. The present case arises out of the petitioner's claim for promotion from the Senior Administrative Grade to the next higher grade i.e. Principal Head of the Department grade of Rs.22,400 -- Rs.24,500. This promotion is on merit. A Departmental Promotion Committee met in October 2001 and recommenced the petitioner for the higher grade. On 14.6.2002, however, his junior was promoted. According to the petitioner, this was due to a decision to initiate departmental inquiry on 29.4.2002. However, the charge-sheet was issued only on 3.12.2002. It appears that the Central Vigilance Commission on a reference had tendered first stage advice on 3.7.2002 against taking action against the respondent. Thus, no charge-sheet was issued immediately thereafter. It, however, appears that on reconsideration the Commission agreed to the proposal to initiate disciplinary proceedings.

4. Initially, the respondent filed O.A. no.735 of 2002 after the receipt of the first stage advice of the Central Vigilance Commission for quashing the action of the petitioner in sending back the case to the Central Vigilance Commission. This Original Application has been disposed of by the Tribunal by order dated 20.11.2002 directing the competent authority to take a decision after applying its mind afresh. Thereafter, the petitioner issued a charge-sheet which was challenged by the respondent by filing another Original Application before the Tribunal which was disposed of. Thereafter, the present charge-sheet was issued on 3.12.2002.

5. It appears that in the past the petitioner has been served with two charge-sheets in two other cases with which we are not concerned here.

6. Mr. Sureshkumar, the learned counsel appearing for the Petitioner Union of India strongly contended that the above Judgment of the Central Administrative Tribunal is patently contrary to the Judgment of the Supreme Court in **Union of India and Anr. Vs. R.S. Sharma 2000 (2) LLJ 1271,** wherein a similar rule as in the instant case was specifically considered and the same has been interpreted as under:-

11. Without conceding to the above position, Shri Mukul Rohtagi, Additional Solicitor General, adopted an alternative contention based on Paragraph 7 of the Sealed Cover Procedure which reads thus:

> "**Sealed cover applicable to officer coming under cloud before promotion.** - A Government servant, who is recommended for promotion by the Departmental Promotion Committee but in whose case any of the circumstances mentioned in para 2 above arise after the recommendations of the D.P.C. are received but before he is actually promoted will be considered as if his case had been placed in a sealed cover by the D.P.C. He shall not be promoted until he is completely exonerated of the charges against him and the provisions contained in this O.M. will be applicable in his case also."

12. The conditions necessary to invoke the said clause are:

(1) Recommendations of the D.P.C. should have been made for promoting the Government servant.

(2) After such recommendations and before he is actually promoted any one of the circumstances in clause (ii) of the second paragraph **(supra)** should have arisen.

13. Two factual aspects are admitted. One is that respondent was not actually promoted even now. The other is that formal sanction has been accorded to prosecute him in the meanwhile. If that be so, paragraph 7 of the Sealed Cover Procedure would entirely apply and the recommendations made by the D.P.C. in respect of the respondent have to remain in the sealed cover "until he is completely exonerated of the charges against him."

14. Shri Anil Kumar Sharma, learned counsel, adopted the contention that the situation would not have arisen as envisaged in paragraph 7 of the Sealed Cover Procedure if the appellants had complied with the conditions stipulated in the Office Memorandum dated July 31, 1991 either on that day itself or atleast soon thereafter by promoting the respondent. Learned counsel contended that the Department had wilfully and deliberately avoided to comply with the said Office

Memo dated July 31, 1979, and hence appellants should not be permitted to take advantage of their own wrong.

15. We are not impressed by the said arguments for two reasons. One is that, what the Department did not do is not the yardstick indicated in paragraph 7 of the Sealed Cover Procedure, what is mentioned therein is that it cannot apply to the Government servant who is not "actually promoted" by that time. Second is that, the stand taken up by the Department is that in spite of deletion of clause (iv) of the second paragraph, the recommendations of the D.P.C. must remain in the sealed cover on account of the conditions specified in Clause (iii) of the said paragraph by virtue of the operation of paragraph 7 thereof. We cannot say that the said stand was incorrect and therefore, we are unable to blame the Department for not opening the sealed cover immediately after July 31, 1999.

16. Learned counsel for the respondent made an endeavour to contend that in the light of the decision of this Court in **Union of India v. K. V. Jankiraman, AIR 1991 SC 2010 1991 (4) SCC 109 : (1991-II-LLJ-570)**, the Sealed Cover Procedure can be resorted to only after Charge Memo is received or a charge-sheet is filed and that unless such an event had happened at the relevant time the Government employee cannot be denied of his promotion, if he is otherwise entitled to it. Learned counsel also submitted that **Jankiraman's** case was since followed in **Union of India v. Dr. Sudha Salhan, AIR 1998 SC 1094 : 1998 (3) SCC 394 : (1998-II-LLJ-241), Bank of India v. Degala Suryanarayana, AIR 1999 SC 2407 : 1999 (5) SCC 762 : (1999-II-LLJ-682).** The clauses of second paragraph of the Sealed Cover Procedure considered in **Jankiraman's** case were not those involved in the present case and hence that decision is of no avail to the respondent. In the other two decisions, the facts warranted application of the ratio contained in **Jankiraman's** case. The added factor in these two cases was that the public servant concerned had been exonerated of the charges framed by the Criminal Courts. In the present case the respondent is still facing the trial for serious offences, and hence the situation is different.

17. We may also point out, in this context, that in **Delhi Development Authority v. H.C. Khurana, AIR 1993 SC 1488 : 1993(3) SCC 196 : (1993-II-LLJ-303)** and **Union of India v. Kewal Kumar, AIR 1993 SC 1585 : 1999 (3) SCC 204 : (1993-II-LLJ-692)** found that the

ratio in **Jankiraman** is applicable only to the situation similar to the cases discussed therein, and hence the Sealed Cover Procedure resorted to by the D.P.C. in those two cases was upheld by this Court.

18. In our opinion, the Tribunal has erred in overlooking paragraph 7 of the Sealed Cover Procedure **(supra)** and hence the direction issued by it as per the impugned judgment cannot be sustained. We therefore, allow these appeals and set aside the said direction.

7. In the instant case, the concerned Rule issued by the Ministry of Railways, Railway Board, Rule 2 reads as under:-

Cases of Government Servants to whom 'Sealed Cover' Procedure will be applicable.

2. At the time of consideration of the Cases of Government Servants for empanelment, details of Government Servants in the consideration zone for promotion falling under the following categories should be specifically brought to the notice of the Departmental Promotion Committee:-

(i) Government Servants under suspension;

(ii) Government Servants in respect of whom a chargesheet has been issued and the Disciplinary Proceedings are pending;

(iii) Government Servants in respect of whom prosecution for a criminal charge is pending.

Rule 6 reads as under:-

'Sealed Cover' applicable to Officers coming under cloud before promotion.

6. A Government Servant, who is recommended for promotion by the Departmental Promotion Committee but in whose Case any of the circumstances mentioned in para 2 above arise after the recommendations of the DPC are received but before he is actually promoted, will be considered as if his Case had been placed in a 'Sealed Cover' by the Departmental Promotion

> Committee. He shall not be promoted until the conclusion of Disciplinary Case/ Criminal Proceedings and the provisions contained in this letter will be applicable in his Case also.

8. Shri Sureshkumar, contended that a bare perusal of the above and in the light of the Judgment of the Supreme Court in **R.S. Sharma's** case will clearly indicate that after the recommendations of the DPC but before a person is actually promoted his case should be considered as if he had been placed in a sealed cover. Shri Sureshkumar contended that the aforesaid judgment of the Supreme Court in **R.S. Sharma's** case will squarely apply in the instant case and that the Central Administrative Tribunal had clearly erred in its judgment and to that extent the same is perverse. Thereafter Shri Sureshkumar also brought to our notice a Division Bench judgment of this Court in **R.P. Mittal Vs. Union of India** and another in Writ Petition No. 3971 of 2000 dated 23.11.2000, wherein also this Court, while interpreting the deemed sealed cover procedure after relying upon the aforesaid Supreme Court judgment in **R.S. Sharma's** case has held as under:-

> 10. In the instant case also the petitioner's name was recommended by DPC and his name was included in the list. However, till the list was finalised he was served with the charge sheet. In other words the charge sheet was issued to him before he was actually promoted and thus para 6 is clearly attracted. We are in agreement with the view taken by the Tribunal that the deemed sealed cover procedure will apply in the present case.

9. Shri Sureshkumar, therefore, contended that the emphasis in the above Rule is "actually promoted" and not that the person "is entitled to be promoted." The authorities have deliberately chosen the word "actually" as such, the plain meaning will have to be given to the same and it should not be interpreted as "is entitled to be promoted". Shri Sureshkumar also referred to and relied on the judgment of the Supreme Court in **M/s. Bajrang Jute Mills Vs. State of Andhra Pradesh AIR 1966 SC 376**, wherein the words "actually delivered" were interpreted as under:-

> (8) The facts found by the taxing authorities clearly establish that property in the goods despatched by the appellant passed to the A.C.C. within the State of Andhra when the railway receipts were handed over to the agent of the A.C.C. against payment of price. The question still remains were the transactions 'non-Explanation sales' i.e. falling outside the Explanation to Art 286(1)? To attract the Explanation, the goods had to be actually delivered as a direct result of the sale, for the purpose of consumption in the State in which they were delivered. It is not disputed that the goods were supplied for the purpose of consumption outside the State of Andhra, and in the States in which they were supplied. It is submitted that the goods were actually delivered within the State, when the railway receipts were handed over to the agent of the buyer. But the expression "actually delivered" in the context in which it occurs, can only mean physical delivery of the goods, or such action as puts the goods in the possession of the purchaser: it does not contemplate mere symbolical or notional delivery e.g., by entrusting the goods to a common carrier, or even delivery of documents of title like railway receipts. In **C. Govindarajulu Naidu and Co. v. State of Madras, AIR 1953 Mad 116**. Venkatarama Ayyar, J., dealing with the concept of actual delivery of goods

so as to attract the application of the Explanation to Art. 286(1) (a) rightly observed:

"In the context it can mean only physical delivery and not constructive delivery such as by transfer of documents of title to the goods. The whole object of the Explanation is to give a power of taxation in respect of the goods actually entering the State for the purpose of use therein and it will defeat such a purpose if notional delivery of the goods as by transfer of documents of title to the goods within the State is held to give the State a power to tax, when the goods are actually delivered in another State."

A similar view has been expressed in two other cases: **Capoo Ltd. v. Sales Tax Officer, AIR 1960 All 62, and Khaitan Minerals v. Sales Tax Appellate Tribunal for Mysore, AIR 1963 Mys 141.**

10. Shri Sureshkumar also referred to another Supreme Court judgment in **State of M.P. and Another V. I.A. Qureshi (1998) 9 SCC 261**, wherein also the Supreme Court has held that the sealed cover can only be opened in case of exoneration and not otherwise. Shri Sureshkumar finally contended that the judgment of the Central Administrative Tribunal can not be sustained in law at all, under the aforesaid facts and circumstances.

11. Shri Sureshkumar also brought to our notice that the judgment of the Gujarat High Court in **Union of India v. D.K. Shrivastava,** dated 24.12.2001 cannot be made applicable in the instant case, as ultimately the Supreme Court had merely rejected the Special Leave Petition and not confirmed the said judgment. Shri Sureshkumar also

contended that Gujarat High Court's interpretation of the words "actually promoted" is contrary to the interpretation by the Supreme Court in **R.S. Sharma's** case as well as by our Division Bench judgment in **R.P. Mittal**'s case. In any event, Shri Sureshkumar submitted that a mere dismissal of Special Leave Petition, does not mean that the Supreme Court has confirmed the judgment of the Gujarat High Court. In that behalf, he referred to and relied on judgment of the Supreme Court interpreting the scope with regard to grant or refusal of Special Leave, dismissal of Special Leave Petition, at the admission stage in **Kunhayammed and others v. State of Kerala and another (2000) 6 Supreme Court Cases 359**, wherein paragraph 43 reads as under:-

> 43. We may look at the issue from another angle. The Supreme Court cannot and does not reserve or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage.

12. Shri Cama, the learned Senior Counsel appearing for the Respondent Employee strongly relied on the Gujarat High Court judgment in **Union of India v. D.K. Shrivastava** case and submitted that after the Supreme Court dismissal of SLP, the said judgment should hold the

field.

13. In any event, Shri Cama contended that an employee who was junior to the Petitioner was promoted on 14.6.2002, the Petitioner also ought to have been promoted as was entitled to be promoted on the very same day itself.

14. Shri Cama, the learned Senior Counsel therefore, contended that in the instant case, the Petitioner was issued with the chargesheet only on 3.12.2002, hence before the issuance of chargesheet, itself the Petitioner should have been promoted on 14.6.2002 itself. Shri Cama, contended that relying on the judgment of the Supreme Court in **Union of India and others Vs. K.V. Jankiraman and others (1991) 4 Supreme Court Cases 109**, the deemed sealed cover procedure could not have been adopted in the Respondent's case as the Respondents ought have been given the promotion as on 14.6.2002. There was no chargesheet filed against the Petitioner by that date. To put in other words, Shri Cama's contention is that as there was no chargesheet filed by that day i.e. 14.6.2002, and his junior was promoted, the Respondent also should have been promoted. Shri Cama, relied upon a Division Bench judgment of our High Court in **Sharbat Chand Jain v. Bank of India and ors. 2001 I CLR 838**, wherein this Court had

not followed **Union of India and R.S. Sharma's** case. Shri Cama, therefore contended that as Gujarat High Court has confirmed the order of the Central Administrative Tribunal in **D.K. Shrivastava's** case, finally the Supreme Court had rejected the Special Leave Petition, this Court ought to follow the same.

15. Having heard both the learned counsel at length, one thing is very clear that the facts and circumstances in the instant case are squarely covered by the case of the Supreme Court in **Union of India V. R.S. Sharma**. One has to note very clearly that the authorities while framing the above Rule have thoughtfully and deliberately used the words "actually promoted" and they have not used the words "is entitled to be promoted". Shri Cama would have been right if the word "promoted" only were to be used, then one could say then even "entitled to be promoted", can come within "promoted", but once the words used are "actually promoted" then we have to give specific meaning to the word "actually". "Actually promoted" necessarily means in reality a person concerned has been promoted. Therefore, the very objective appears to be that when a person who is under a cloud until he is actually promoted, the same can be prevented by adopting the deemed sealed cover procedure.

16. As far as the Gujarat High Court in **D.K. Shrivastava**'s case is concerned, there are no detailed discussion on the interpretation of the words "actually promoted" and a mere dismissal of Special Leave Petition by the Supreme Court would not necessarily mean that the Supreme Court has fully approved the said judgment of the Gujarat High Court in that behalf. On the contrary, the Supreme Court has analysed and interpreted in depth the words "actually promoted" in **R.S. Sharma's** case. In fact the Supreme Court has observed in paragraph 44 of the **Kunhayammed and others v. State of Kerala and Another (2000) 6 Supreme court Cases 359** as under:-

> 44. To sum up, our conclusions are:
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> (i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.
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> (ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.
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> (iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under

Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC.

17. Even **Sharbat Chand Jain** case will be of no assistance to Shri Cama, as it is clearly mentioned in paragraphs 16 and 17, the facts of that case were totally different from **R.S. Sharma's** case. Even **Jankiraman's** case will not help the Petitioner, as the same has been fully considered, in **R.S. Sharma's** case by the Supreme Court.

18. Under the aforesaid facts and circumstances, specially in the light of the very clear interpretation by the Supreme Court in **Union of India Vs. R.S. Sharma** and also the Division Bench judgment of our High Court in **R.P. Mittal V. Union of India,** we are clearly of the view that the judgment of the Central Administrative Tribunal is patently erroneous and is perverse and contrary to the above judgment of the Supreme Court. Under these circumstances, Rule is made absolute in terms of prayer clause (a), however with no order as to costs.

19. Issuance of Certified Copy expedited.

(S. RADHAKRISHNAN, J.)

(S.A. BOBDE, J.)